

Letter of Findings Number: 04-20130051P
Sales and Use Tax
For the Periods September 2011 to July 2012

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ISSUES

I. Sales and Use Tax – Late Payment Penalty.

Authority: IC § 6-8.1-5-1; IC § 6-8.1-9-1; IC § 6-8.1-9-2; IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the assessment of a penalty for late payment of sales and use tax.

II. Sales and Use Tax – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest on its tax liability.

STATEMENT OF FACTS

Taxpayer is a corporation doing business in Indiana. For August 2011, Taxpayer erroneously accrued and self-assessed use tax on one transaction. Taxpayer realized the error and began "offsetting future reported tax liabilities in order to recover the overpaid amount." Taxpayer reported zero tax for eleven months in order to partially recover the overpayment.

Taxpayer separately filed a claim for refund for the August 2011 overpayment. This refund claim was filed with knowledge of the attempted offsets that Taxpayer had filed. The Indiana Department of Revenue ("Department") issued a refund check for the entire amount of the August 2011 overpayment. Once Taxpayer received the refund check, Taxpayer immediately filed returns reporting the actual amount of tax due for each month that Taxpayer previously claimed offsets. Taxpayer paid the tax amounts reported without payment of penalties and interest. The Department imposed penalties and interest on the late payments, which Taxpayer protested.

Taxpayer had previously been notified of an administrative hearing. However, Taxpayer did not call or appear at the designated time of the hearing. Within thirty days of the scheduled hearing date, Taxpayer contacted the Department, and the Department granted reconsideration of Taxpayer's request. This Letter of Findings is based on the Department's records related to Taxpayer and previous correspondence with Taxpayer. Further information will be supplied as necessary.

I. Individual Income Tax – Late Payment Penalty.

DISCUSSION

Taxpayer protests the assessment of a penalty for failure to remit Indiana sales and use tax in a timely manner.

IC § 6-8.1-10-2.1 states in relevant part:

(a) If a person:

- (1) fails to file a return for any of the listed taxes;
- (2) fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment;
- (3) incurs, upon examination by the department, a deficiency that is due to negligence;
- (4) fails to timely remit any tax held in trust for the state; or
- (5) is required to make a payment by electronic funds transfer (as defined in [IC 4-8.1-2-7](#)), overnight courier, or personal delivery and the payment is not received by the department by the due date in funds acceptable to the department;

the person is subject to a penalty.

(b) Except as provided in subsection (g), the penalty described in subsection (a) is ten percent (10 [percent]) of:

- (1) the full amount of the tax due if the person failed to file the return;
- (2) the amount of the tax not paid, if the person filed the return but failed to pay the full amount of the tax shown on the return;
- (3) the amount of the tax held in trust that is not timely remitted;
- (4) the amount of deficiency as finally determined by the department; or
- (5) the amount of tax due if a person failed to make payment by electronic funds transfer, overnight courier, or personal delivery by the due date.

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.*

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

In this particular case, Taxpayer has provided information to indicate that it reasonably thought that it had paid the tax for the months in question through its application of the erroneous payment. Based on the circumstances present in this case, Taxpayer has provided sufficient information to demonstrate that its failure to timely remit Indiana sales and use taxes was due to reasonable cause.

However, the Department notes that the Department has specific procedures for handling overpayments. See, e.g., IC §§ 6-8.1-9-1, -2. Taxpayer is advised that, if it has a future overpayment, it is to file refund claims with the Department on the Department's refund claim forms (or such other manner as the Department permits) in order to recover the overpayment. Filing a tax return reporting a lower amount of tax and using the difference as an "offset" is not permissible, and future underpayments that result from an application of overpayments when a taxpayer does not follow the Department's procedures will not be considered as resulting from "reasonable cause."

FINDING

Taxpayer's protest is sustained.

II. Sales and Use Tax – Interest.

DISCUSSION

Taxpayer protests the imposition of interest with respect to its late payment of tax. For taxes unpaid by the due date for payment, IC § 6-8.1-10-1(b) provides for the imposition of interest. Notwithstanding the issue of the Department's retention of the overpayment, IC § 6-8.1-10-1(e) provides that the Department cannot waive interest even if reasonable cause otherwise exists for penalty waiver. Further, the interest is assessed from the due date of the payment for each period, pursuant to IC § 6-8.1-10-1.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest is sustained on the late payment penalty. Taxpayer's protest of interest is denied.

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